No. 02-30326

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFRED ARNOLD AMELINE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, D.C. No. CR-02-00011-SEH
The Honorable Sam E. Haddon, *United States District Judge.*

PETITION FOR REHEARING EN BANC

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MONTANA

PETITION FOR REHEARING EN BANC

INTRODUCTION

A three-judge panel of this Court held that defendant's sentence – which, like thousands of other federal sentences, was imposed prior to *United States v. Booker*, 125 S. Ct. 738 (2005), and without any objection to the mandatory nature of the Sentencing Guidelines – amounted to reversible plain error warranting a remand for resentencing. The United States of America, through the 14 United States Attorneys

in the Ninth Circuit, seek rehearing en banc on an expedited basis.[1/]

The panel's interpretation of the plain-error standard of Fed. R. Crim. P. 52(b), and its application of that standard to forfeited *Booker* claims, are analytically flawed and seriously misapprehend the Supreme Court's plain-error jurisprudence. *Cf. United States v. Dominguez-Benitez*, 124 S. Ct. 2333 (2004) (reversing this Circuit's analysis of the "substantial rights" prong of the plain-error standard); *United States v. Vonn*, 535 U.S. 55 (2002) (reversing this Circuit's refusal to apply plain-error analysis to forfeited claims under Fed. R. Crim. P. 11). Of particular concern, the mode of analysis used to determine whether defendant's "substantial rights" were affected under the third prong of the plain-error test is erroneous; indeed, the Eleventh Circuit squarely rejected this very analysis, and, in doing so, exposed its shortcomings. *United States v. Rodriguez*, — F.3d —, 2005 WL 272952 (11th Cir. Feb. 4, 2005). *Rodriguez* was issued five days before this decision, but the panel did not mention it, let alone consider its analysis. The panel's analysis of the discretionary fourth prong of the plain-error test is similarly flawed. It fails to

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[1/] We are submitting concurrently with this petition a motion for expedited consideration of the petition and, if appropriate, for expedited argument. To ensure that similarly-situated cases are treated similarly, we also are requesting that the Court defer disposition of all pending direct criminal appeals that raise *Booker* issues pending the disposition of this petition. In the event the petition is granted, the deferral should be extended pending final disposition.

appreciate that defendant's sentence was imposed pursuant to a fair, two-decades-old process, and was otherwise reasonable. No miscarriage of justice would result if that sentence, and the thousands of others like it, was permitted to stand.

Furthermore, the panel's ruling has profound and potentially destabilizing consequences for the administration of the criminal justice system, particularly in this Circuit, whose district judges impose more Guidelines sentences per year than any other Circuit. *See* United States Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics*, Table 2 (nearly 14,000 Guidelines sentences were imposed within the Ninth Circuit in FY 2002). Few, if any, defendants are likely to have raised an objection to the mandatory nature of the Guidelines; and as a result, the proper interpretation of the plain-error test, and its application to *Booker* claims, presents a question of far-reaching importance.

At a practical level, moreover, if the panel's decision remains in tact, the result will be literally thousands of remand orders being entered in pending direct criminal appeals – a consequence of which the panel was keenly aware. Slip op. at 17 ("[I]t is the truly exceptional case that will not require remand for resentencing under the new advisory guidelines regime."). Such an avalanche of remand orders would threaten to bring the criminal justice system to a complete standstill by overtaxing the resources of not only the federal district judges, but also the government and the

defense bar. As a consequence, many defendants will receive new sentencing hearings – and potentially new sentences – to which they are not legally entitled. While these disruptions have the potential to overwhelm the district courts, this resource drain only begins to tell the story, for, as *Booker* makes clear, dissatisfied litigants retain the right to appeal sentences for reasonableness. Thus, the remand orders that are likely to be entered on the basis of the panel's decision will assuredly result in a second shock wave of post-remand sentencing appeals, which will place a serious strain on the resources of this Court as well. For all these reasons, we urge the Court to reconsider the panel decision en banc.

STATEMENT

1. a. Defendant was arrested during an investigation into methamphetamine trafficking on the Fort Belknap and Rocky Boy's Indian Reservations. Defendant, a resident and member of the Rocky Boy's tribe, supplied and distributed methamphetamine on the reservation. Gov't C.A. Br. 2-7. He was charged with conspiring to distribute an unspecified quantity of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1), and pleaded guilty to that charge pursuant to a written plea agreement that was silent with respect to drug quantity. At the change-of-plea hearing, defendant admitted distributing "some methamphetamine," but denied that it was 1.5 kilograms. The PSR attributed 1,079.3 grams of methamphetamine to him,

resulting in an offense level of 32, PSR ¶ 34; U.S.S.G. 2D1.1(c)(4), and recommended a 2-level enhancement for possession of a firearm, PSR ¶ 35.

b. At sentencing, the court overruled defendant's evidentiary objections and found, by a preponderance of the evidence, that he was responsible for 1,603.60 grams of methamphetamine, Tr. Sent. (11/17/02) at 103-06, which corresponded to a base offense level of 34.[2/] After adding 2 levels for possession of a firearm, and deducting 3 levels for early acceptance of responsibility, *id.* at 111, defendant's guidelines imprisonment range, based on an adjusted offense level of 33 and criminal history category I, was 135 to 168 months, *id.*

The court then "outline[d] * * * in some detail" the reasons for the specific sentence it would ultimately impose, *id.* at 112. It began by characterizing defendant's actions as "very serious and extremely detrimental to the community," *id.* at 113, because it involved "commercial criminal activity for profit" – *i.e.*, "multiple transactions of distribution of [an] unlawful substance * * * over an extended period of time." *Id.* at 114. The court considered defendant's personal "history," and advanced "age," *id.* at 113, and the fact that "many people were hurt as a result of [his] conduct." *Id.* at 114. The court also considered defendant's

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[2/] This amount included several additional drug sales that the Probation Officer had not relied upon in making his recommendation. See PSR ¶¶ 20-21.

arguments in mitigation, namely, that he engaged in these activities to provide for his family, but stated that this fact "impresses the court not positively at all" because most citizens do not resort to illegal activity to support their families. *Id.* at 113; *id* ("And I find that nothing but a negative matter in connection with your case."). After weighing these factors, the court concluded that a sentence "in the mid-range" of the guidelines was appropriate, and imposed a 150-month sentence. *Id.* at 114.

2. Defendant appealed, principally arguing that the district court's drug quantity findings (but not the firearms enhancement finding) were clearly erroneous, Def. C.A. Br. 23-42. On June 24, 2004, after the case had been submitted, the Supreme Court held, in *Blakely v. Washington*, 124 S. Ct. 2531, that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 490 – applies to facts that increase a defendant's sentence under Washington State's sentencing guidelines. *Id.* at 2537. After receiving supplemental briefs, a divided panel of this Court held, inter alia, that *Blakely* also applies to findings used to enhance a sentence under the federal Sentencing Guidelines, and that defendant's sentence amounted to reversible plain error. *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). The panel concluded that, on remand, the district court

could convene a sentencing jury to try the enhancement issues.[3/]

3. Defendant petitioned for rehearing concerning the remedy. While his petition was pending, the Supreme Court granted certiorari in *United States v. Booker/Fanfan* to consider whether and how *Blakely* applies to the federal Sentencing Guidelines. This Court held defendant's petition in abeyance. On January 12, 2005, the Supreme Court issued its decision in *Booker*, holding that the Sixth Amendment, as construed in the *Apprendi-Blakely* line of cases, applies to the federal Sentencing Guidelines because the Guidelines are a mandatory system in which sentences are increased based on facts found by the judge. 125 S. Ct. 738, 746; *id.* at 749-50 ("This conclusion rests on the premise, common to [the Washington guidelines and the federal guidelines], that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.").

In the remedial portion of the decision, the Court rejected the argument (which the panel had endorsed, *see* 376 F.3d at 980-83), that the Guidelines should remain mandatory but be applied based only on facts found by the jury or admitted by the defendant. That system, the Court concluded, would be inconsistent with what

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[3/] The panel unanimously agreed that, independent of the Sixth Amendment implications of *Blakely*, defendant was entitled to resentencing on the ground that the district court improperly presumed the factual findings in the PSR to be correct and required defendant to prove otherwise. *Ameline*, 376 F.3d at 979 n.14; *id.* at 984 n.1 (Gould, J., dissenting) (agreeing that a remand was required on this basis).

Congress intended. *Id.* at 758-764. Instead, the Court excised the statutes that made the Guidelines mandatory, and thus "ma[de] the Guidelines effectively advisory." *Id.* at 757. As modified, the Sentencing Reform Act now "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004)." 125 S. Ct. at 757; *id* at 767 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

Despite the excision of these provisions, the Court explained, the Sentencing Reform Act continues to provide for sentencing appeals by defendants and the government; and, when a sentence is challenged on appeal, the court of appeals will decide whether it is "unreasonable." *Id.* at 765. The Court did not define "reasonableness," but stated that the factors listed in 18 U.S.C. 3553(a) "will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Id.* at 766. 1

4. On February 9, 2005, after receiving supplemental briefs, the panel withdrew its earlier opinion and issued a new opinion, inter alia, vacating defendant's sentence and remanding for resentencing, this time on the ground that his sentence amounted to reversible plain error under *Booker*. *United States v. Ameline*, No. 02-

30326, slip op. at 1882 (Addendum), amended (Feb. 10, 2005). After finding that defendant's mandatory Guidelines sentence constituted "error" that was "plain," the court expressed "no doubt" that the sentence imposed "affect[ed] [defendant's] substantial rights" because it "far exceeded the maximum sentence under the Guidelines that was supported by [defendant's] admission that his offense involved only a 'detectable quantity' of methamphetamine." *Id.* at 1881. The panel opted to notice this error because "leav[ing] standing [a] sentence imposed under the mandatory guidelines regime * * * is to place in jeopardy the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 1882 (quoting *United States v. Hughes*, 396 F.3d 374, 2005 WL 147059, at *5 (4th Cir. Jan. 25, 2005)). The panel refused to consider the reasonableness of the actual sentence, concluding that doing so "'would be tantamount to performing the sentencing function ourselves.'" *Id.* "Accordingly," the court commented, "it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guidelines regime." *Id.*[4/]

[4/] The panel also adhered to its earlier conclusion that the district court erred by shifting the burden of proof at sentencing. Slip op. at 1885. This alternative ruling does not detract from the propriety of rehearing this case en banc, however, because the panel's interpretation of *Booker* – which resolves issues of undisputed circuit-wide importance – remains binding. *Richmond Co. v. United States*, 275 U.S. 331, 340 (1922) ("It does not make a reason given for a conclusion in a case obiter dictum because it is only one of two reasons for the same conclusion."); *Best Life Assur. Co. of Calif. v. C.I.R.*, 281 F.3d 828, 834 (9th Cir. 2001) (same).

REASONS FOR GRANTING THE PETITION

The panel's precedent-setting interpretation of *Booker*, and its application of that decision to a forfeited claim of error, should be reconsidered en banc. The panel's analysis of the third and fourth prongs of the plain-error standard is seriously flawed in several critical respects; and, allowing the decision to stand uncorrected would needlessly disrupt the proper administration of the criminal justice system by dictating unwarranted remands in hundreds, and probably thousands, of criminal appeals currently pending on direct review.

THE PANEL FUNDAMENTALLY ERRED IN APPLYING RULE 52(b)'S PLAIN-ERROR STANDARD TO *BOOKER* CLAIMS.

The opinions in this case correctly held that defendant forfeited his *Blakely/Booker* challenge, and, as a result, his claim was subject to review only for plain error. Fed. R. Crim. P. 52(b). Under the now-familiar four-part test,

> there must be (1) error, (2) that is 'plain' [which the Court stated is "'synonymous with 'clear' or equivalently, 'obvious'"], and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. United States, 520 U.S. 461, 466-467 (1997); *accord United States v. Cotton*, 535 U.S. 625, 631-632 (2002); *United States v. Olano*, 507 U.S. 725, 732 (1993). The panel's determinations that there was "error" which, under current law,

was "plain," are unobjectionable; however, the same cannot be said for its analysis of the third and fourth requirements.

A. The Panel's "Substantial Rights" Analysis Misapprehends The Nature Of The Error That Occurred In This Case.

To satisfy the third requirement of Rule 52(b), defendant bears the burden[5/] of showing that the error affected his "substantial rights" – *i.e.*, was prejudicial because he would have received a lower sentence under the advisory Guidelines system. *Dominguez-Benitez*, 124 S. Ct. at 2339 (error "affect[s] substantial rights" if it has "a prejudicial effect on the outcome of a judicial proceeding"); *United States v. Buckland*, 289 F.3d 558, 568-570 (9th Cir. 2002) (en banc) (under plain-error standard, error did not affect "substantial rights" because it did not affect defendant's sentence). In applying this standard to a *Booker* claim, a reviewing court "ask[s] whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." *United States v. Rodriguez*, — F.3d —, 2005 WL 272952, at *9 (11th Cir. Feb. 4, 2005). Citing *Jones v. United States*, 527 U.S. 373, 394 (1999), *Rodriguez* explained that, "where the effect of an error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant * * * has not met

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[5/] *Olano*, 507 U.S. at 734 ("[I]t is the defendant rather than the government who bears the burden of persuasion" on the third prong of the plain error test).

his burden of showing that his substantial rights have been affected." *Id.* at *10.

In this case, the panel reasoned that defendant's substantial rights were affected because "the district court's sentence far exceeded the maximum sentence under the Guidelines that was supported by [defendant's] admission that his offense involved only a 'detectable quantity' of methamphetamine," slip op. at 1881 – *i.e.*, because the court increased his sentence based on facts not found by the jury beyond a reasonable doubt and to which he did not admit. But that analytical focus mistakes the nature of the error that occurred in this case. The error in a Guidelines sentence imposed prior to *Booker* is not, as the panel believed (*see id.*), the use of judicially-found facts to impose an enhanced sentence; rather, the error is the use of such enhancements in connection with a *mandatory* Guidelines regime. *Booker* itself emphasizes that once the statutes that made the Guidelines mandatory were excised, the "system remaining after excision" is constitutional. 125 S. Ct. at 764-768. The Eleventh Circuit recently underscored this point, explaining that:

> the constitutional error whose prejudicial measure we take is not the use of extra-verdict enhancements. Their use remains a constitutional part of guidelines sentencing in the post-*Booker* era. The constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge.

Rodriguez, 2005 WL 272952, at *9. *Rodriguez*'s persuasive analysis was not considered by the panel but should be reconsidered en banc. *See* Fed. R. App. P.

35(b)(1)(B) (intercircuit conflict is a sufficient justification for rehearing en banc).

Applying the correct standard, defendant could not meet his burden. *Jones*, 527 U.S. at 394-395. To the contrary, the sentencing record provides no basis for the conclusion that the district court would have actually sentenced defendant more leniently under an advisory-Guidelines regime. The court noted the "very serious" nature of defendant's actions, and the "extremely detrimental" nature of the harm to the reservation community, and was unimpressed with his arguments in mitigation. And, in fashioning a sentence, the court specifically considered the statutory factors that are relevant under the advisory-Guidelines system. *Compare* S. Tr. 111-14 (defendant's age, personal history, and nature and the circumstances of the offense) *with* 18 U.S.C. 3553(a)(1) (sentencing court "shall consider the nature and circumstances of the offense and the history and characteristics of the defendant"); *see Booker*, 125 S. Ct. at 764 (after *Booker*, the Sentencing Reform Act "requires judges to take account of the Guidelines together with other sentencing goals" in Section 3553(a)). The court stated that defendant "undertook commercial criminal activity for profit" by "engag[ing] in multiple transactions of distribution of [an] unlawful substance * * * over an extended period of time," and, in doing so, "without question * * * hurt * * * many people." S. Tr. 114. "[T]h[e]se considerations," the

court explained, coupled with the need to "promote respect for the law," *id.* at 113,[6/] "fashion a sentence that will deter others," *id.*,[7/] "provide[] just punishment for the crime that has been committed,"[8/] and "protect the public from future conduct of this sort by you," *id.* at 114,[9/] justified a sentence in the middle of the guidelines range. *Id.* at 114.

Unfortunately, the panel's substantial rights analysis does not reference the sentencing record or discuss the effect of these statements on that analysis, presumably owing to the fact that it misperceived the nature of the error at issue. Had it considered the record, moreover, the panel would not have been able to conclude, as it did, that defendant demonstrated the requisite effect on his substantial rights.[10/]

[6/] 18 U.S.C. 3553(a)(2)(A) ("promote respect for the law").

[7/] 18 U.S.C. 3553(a)(2)(B) ("afford adequate deterrence to criminal conduct").

[8/] 18 U.S.C. 3553(a)(2)(A) ("provide just punishment for the offense").

[9/] 18 U.S.C. 3553(a)(2)(C) ("protect the public from further crimes of the defendant").

[10/] We believe that the contrary holdings in *United States v. Hughes*, 2005 WL 147059 (4th Cir. Jan. 24, 2005), and *United States v. Oliver*, 2005 WL 233779 (6th Cir. Feb. 2, 2005), are incorrect. *Rodriguez*, 2005 WL 272952, at *10-*13 (*Hughes* and *Oliver* mistakenly "measur[e] prejudice in terms of the effect the extra-verdict enhancements * * * had in determining the guidelines sentencing range. * * * The prejudice inquiry must focus on what has to be changed to remedy the error, and the consideration of extra-verdict enhancements is not to be changed."). We are currently considering whether to seek further review in those cases.

B. The Panel's Analysis Of The Discretionary Fourth Component Of The Plain Error Standard Is Flawed.

A defendant who can show that plain error affecting his substantial rights is not automatically entitled to relief. That is because Rule 52(b) contains a discretionary fourth component that restricts the class of plain errors that may be noticed to those that are "particularly egregious," *i.e.*, those that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15 (1985). The discretion conferred by this fourth component "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.*; *see Johnson*, 520 U.S. at 467 (declining to notice error because no miscarriage of justice would result).

The panel's analysis does not apply these principles. Instead, it concludes, more generally, that sentences imposed under a mandatory Guidelines regime, no matter how reasonable they may have been, jeopardize the integrity of judicial proceedings. Slip op. at 1882. This approach is faulty at several levels. To begin with, it fails to appreciate that defendant was sentenced under a system that was used for almost two decades to sentence thousands of offenders. As one judge has noted, "[i]t would be weird to hold that a sentencing process used since 1987 with the Supreme Court's approbation (*see, e.g., Edwards v. United States*, 523 U.S. 511

(1998)), plus the support of all federal circuits even after *Apprendi*, now must be deemed so unreliable that it undermines the fairness, integrity, and public reputation of judicial proceedings." *United States v. Messino*, 382 F.3d 704, 715 (7th Cir. 2004) (Easterbrook, J., dissenting).

The conclusion that even a "reasonable" sentence imposed under the mandatory Guidelines regime "unquestionably impugns" (slip op. at 1882) the integrity of judicial proceedings is similarly flawed. The Sentencing Commission formulated the Guidelines, and has continually updated them, to reflect nationwide sentencing practices – including identifying and assigning weights to the factors, both aggravating and mitigating, that judges traditionally used in determining an appropriate sentence – and to account for the sentencing objectives in 18 U.S.C. 3553(a).[11/] A sentence within the Guidelines range thus reflects the federal courts' collective sentencing expertise accumulated over the past two decades and, as such,

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[11/] United States Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987); *see* 28 U.S.C. § 994(m) (requiring Commission to "ascertain the average sentences * * * prior to the creation of the Commission"); Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, at 168 (Commission should produce a "complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases"); *Booker*, 125 S. Ct. at 766 (Sentencing Commission has continued to study federal sentencing decisions and "modif[ied] its Guidelines in light of what it learns"); *United States v. Wilson*, — F. Supp. 2d —, 2005 WL 78552, *1, *3-*12 (D. Utah Jan. 13, 2005) (Guidelines generally achieve the congressionally-mandated purposes of sentencing).

is "reasonable."

Viewed another way, defendant is serving a sentence at the center of the range of what would be appropriate under governing law. The effect of the error is that defendant has lost the opportunity to try to convince a particular judge that some other, lesser sentence also would be reasonable and should be imposed. Not every deprivation of a right to a defendant gives rise to a miscarriage of justice, however, and denying a defendant this opportunity cannot be said to amount to the kind of "egregious" error, *Young*, 470 U.S. at 15, that seriously jeopardizes the integrity of sentencing proceedings – particularly when, as here, there is no basis for believing that defendant would have received a lesser sentence under an advisory-guideline system. *United States v. Bruce*, — F.3d —, 2005 WL 241254, at *18 (6th Cir. Feb. 3, 2005) (unlikelihood that court would have imposed lower sentence buttresses conclusion that defendant has not established fourth prong).

Finally, the panel refused to consider the reasonableness of the actual sentence imposed, believing that doing so "would be tantamount to performing the sentencing function ourselves," slip op. at 1882. That concern is misplaced. Whenever a court of appeals conducts harmless- or plain-error analysis, it hypothesizes about what a different decisionmaker *would* have done had there been no error. Undertaking that function, therefore, does not usurp the province of the original decisionmaker; rather,

it is the normal appellate function of a reviewing court. *Cf. Cotton*, 535 U.S. at 633 (stating, on plain-error review, that the grand jury "surely" would have found drug quantity had it been asked); *Johnson*, 520 U.S. 466-67 (petit jury would have found materiality if asked); *Neder v. United States*, 527 U.S. 1, 15-16 (1999) (same under harmless-error analysis).[12/]

[12/] Finally, to the extent the decision, including the dictum that "it is the truly exceptional case that will not require remand for resentencing under the new advisory guideline," slip op. at 1882, can be read to *mandate* reversal, that approach is inconsistent with the principle that "Rule 52(b) is permissive, not mandatory," *Olano*, 507 U.S. at 735. It is also in some tension with *Booker* itself. 125 S. Ct. at 769 ("Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to * * * determin[e], for example, whether the issue was raised below and whether it fails the 'plain-error' test.").

CONCLUSION

For the reasons set forth above, the petition for rehearing en banc should be granted.

Respectfully submitted,

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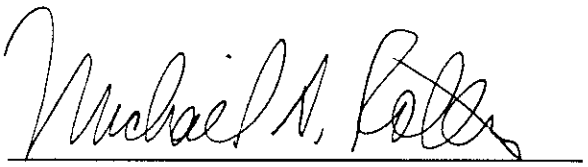
By: 

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I HEREBY CERTIFY, pursuant to Circuit Rules 35-4 and 40-1, that the attached Petition for Rehearing En Banc is:

__x__ Proportionately spaced, has a typeface of 14 points or more and contains 4,198 words (petitions and answers must not exceed 4,200 words).

or

_____ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text (petitions and answers must not exceed 4.200 words or 390 lines of text)

or

_____ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

MICHAEL A. ROTKER
Attorney
United States Department of Justice

Dated: February 16 (MAR), 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two (2) true and correct copies of the foregoing Petition for Rehearing En Banc to be served this ~~15th~~ 16 MAR day of February 2005 by Federal Express overnight delivery on:

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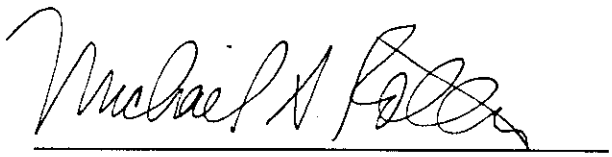

MICHAEL A. ROTKER

ADDENDUM

United States v. Ameline,
No. 02-30326, slip op.
(9th Cir. Feb. 9, 2005),
amended (Feb. 10, 2005)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ALFRED ARNOLD AMELINE, *Defendant-Appellant.*	No. 02-30326 D.C. No. CR-02-00011-SEH ORDER AND OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted November 4, 2003*
Opinion Filed July 21, 2004
Rehearing Granted February 9, 2005
Opinion on Rehearing Filed February 9, 2005
Seattle, Washington

Filed February 9, 2005

Before: Kim McLane Wardlaw, Ronald M. Gould, and
Richard A. Paez, Circuit Judges.

Opinion by Judge Richard A. Paez

*The Panel unanimously finds this case suitable for decision without oral argument.

COUNSEL

Brian P. Fay, Angel, Coil & Bartlett, Bozeman, Montana, for the appellant.

William W. Mercer, United States Attorney, and Lori Harper Suek, Assistant United States Attorney, Great Falls, Montana; Michael A. Rotker, Attorney, United States Department of Justice, Washington, D.C., for the appellee.

ORDER

Appellant Alfred Ameline's Petition for Rehearing is granted. The opinion filed on July 21, 2004, *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), is withdrawn. A new opinion is filed simultaneously with this order.

OPINION

PAEZ, Circuit Judge:

In light of the Supreme Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), we granted appellant Alfred Ameline's petition for rehearing to reconsider our decision in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). In our original opinion, we held that, because Ameline's sentence under the United States Sentencing Guidelines was based on facts found by the district judge by a preponderance of the evidence, his sentence violated the Sixth Amendment as construed by the Supreme Court in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). We vacated Ameline's sentence and remanded for resentencing with directions that, if necessary, a jury determine the amount of drugs attributable to Ameline and whether he possessed a weapon in connection with his conviction, two factors that could enhance his sentence under the Sentencing Guidelines.

After our decision issued and while Ameline's petition for rehearing was pending, the Supreme Court granted certiorari in *United States v. Booker*, 375 F.3d 508 (7th Cir.), *cert. granted*, 125 S. Ct. 11 (2004), and *Fanfan v. United States*, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted before judgment*, 125 S. Ct. 12 (2004), to consider whether, after *Blakely*, application of the federal Sentencing Guidelines violates a defendant's Sixth Amendment rights. In *Booker*, the Court held that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." *Booker*, 125 S. Ct. at 745. To remedy the Sixth Amendment violation, the Court severed two provisions from the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, one which made the Sentencing Guidelines mandatory and one that depended on the mandatory nature of the Guidelines. With the excision of these two provisions, the Court held that the Sentencing Guidelines are now "effectively advisory." *Booker*, 125 S. Ct. at 757.

Our original opinion was consistent with *Booker*'s holding that the Sixth Amendment as construed in *Blakely* applies to the Sentencing Guidelines. It was at odds, however, with the Court's severability remedy that eliminated the mandatory nature of the Sentencing Guidelines. Applying *Booker* to the present case, we conclude that (1) the Court's holding in *Booker* applies to all criminal cases pending on direct appeal at the time it was rendered; (2) because Ameline did not raise a Sixth Amendment argument at the time of sentencing we review for plain error; (3) Ameline's sentence violated the Sixth Amendment and constituted plain error; and (4) the error seriously affected the fairness of Ameline's proceedings. Accordingly, we vacate Ameline's sentence and remand for resentencing.

To provide guidance to the district court in resentencing Ameline, we also address Ameline's challenge to the district court's ruling that he bore the burden of disproving the amount of methamphetamine that the Presentence Report

("PSR") attributed to him. In addressing this issue, we conclude that *Booker* did not relieve the district court of its obligation to determine the Sentencing Guidelines range for Ameline's offense of conviction. In determining the guideline range, the district court must still comply with the requirements of Federal Rule of Criminal Procedure 32 and the basic procedural rules that we have adopted to ensure fairness and integrity in the sentencing process. Although the district court is not bound by the Sentencing Guidelines range, basic procedural fairness, including the need for reliable information, remains critically important in the post-*Booker* sentencing regime.

I.

Ameline pled guilty to knowingly conspiring to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. His plea agreement did not specify the quantity of methamphetamine for purposes of sentencing, but rather left that determination to the district court at the time of sentencing. At Ameline's change of plea hearing, he disputed the government's offer of proof that he distributed one and a half kilograms of methamphetamine, but admitted that "some methamphetamine" was involved in his offense conduct. At the end of the hearing, Ameline's counsel informed the court that he expected to present witnesses who would dispute the amount of methamphetamine that the government attributed to Ameline.

The PSR prepared by the Probation Office attributed 1,079.3 grams of methamphetamine to Ameline for purposes of applying the drug equivalency table found in the United States Sentencing Guidelines Manual ("U.S.S.G.") § 2D1.1(c), resulting in a recommended base offense level of 32. The PSR also recommended a two-level enhancement pursuant to § 2D1.1(b)(1) for possession of a weapon in connection with the offense. This enhancement was based on hearsay testimony by a confidential informant that Ameline

sold to him methamphetamine in exchange for a rifle, and that he once witnessed Ameline threaten his son with a handgun.

After the probation officer disclosed the draft PSR to Ameline and the government, Ameline, as required by the court's April 30, 2002 Sentencing Order, presented the probation officer with a series of objections to the quantity of methamphetamine attributed to him in the report. Ameline also objected to the two paragraphs that formed the basis of the two-level weapon enhancement as "false." In his letter objecting to the draft PSR, Ameline explained the basis for his objections and the evidence on which he would rely at the sentencing hearing. The probation officer dismissed Ameline's objections and reaffirmed his determination of the quantity of methamphetamine in the original PSR, as well as the upward enhancement. In Ameline's pre-hearing Sentencing Memorandum, he objected to the amount of methamphetamine attributed to him in the PSR. Ameline's memorandum detailed the evidence that he intended to rely upon to dispute the drug quantity determined in the PSR.

At the beginning of the sentencing hearing, before any witnesses testified, the district judge informed the parties how he intended to proceed:

> It is the position of this court in this matter, as it is in all such cases, that the facts as recited in the presentence report are prima facie evidence of the facts set out there; that if the defendant challenges the facts set forth in the presentence report, it is the burden of the defendant to show that the facts contained in the report are either untruthful, inaccurate, or otherwise unreliable.

The district judge then instructed defense counsel to call his first witness.[1]

[1]Before counsel called any witnesses, the court again reiterated its position:

Consistent with his objections, Ameline presented testimony from "Toro," aka Shawn Rodriguez, Reuben McDowell, Michael Lamere, and a confidential informant, Dan Metcalf, to dispute the amount of methamphetamine attributed to him in the PSR. At the conclusion of the sentencing hearing, the district court found that 1,603.60[2] grams of methamphetamine were attributable to Ameline, for a base offense level of 34. The district court stated, "I should let all parties know that all findings are based upon a preponderance of the evidence standard and are established at least to that standard in the view of the court." The district court found the § 2D1.1(b)(1) weapon enhancement "undisputed," raising the offense level to 36, but deducted three points for timely acceptance of responsibility. The resulting total offense level was 33. The district court sentenced Ameline to 150 months, in the middle of the 135 to 168 month range established by the Sentencing Guidelines.

II.

A.

On appeal, Ameline initially challenged the district court's determination that he bore the burden of disproving the fac-

> [I]t is my position that the statements in the presentence report, that is, statements of fact, are reliable on their face and prima facie evidence of the facts there stated. And I will be taking those into account to the extent relevant to the obligations that I have in fashioning sentence and fixing responsibility for drug quantities, *if they are not overcome by other evidence presented at this hearing*. Be guided accordingly.
>
> (emphasis added).

[2]This amount was greater than that recommended by the PSR. The PSR described two additional transactions, but the probation officer did not include those transactions in calculating the overall drug amount. The district court, however, included the amounts from those two additional transactions, thus establishing an even higher base offense level.

tual statements in the PSR relating to drug quantity. He also challenged the court's determination that the hearsay evidence used to prove drug quantity was sufficiently reliable. Ameline did not raise a Sixth Amendment challenge to his sentence. When we submitted Ameline's appeal for decision on November 4, 2003, he had contested neither the preponderance of the evidence standard used by the district judge nor the propriety of the judge as factfinder.

Nonetheless, in our original opinion, we noted that the Supreme Court's recent decision in *Blakely* raised the possibility that Ameline's initial challenges had been subsumed by a violation of his Sixth Amendment rights. Based on the Supreme Court's ruling in *Blakely* that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," *Blakely*, 124 S. Ct. at 2537, we concluded that *Blakely* worked "a sea change in the body of sentencing law." *Ameline*, 376 F.3d at 973. In light of the potential impact of *Blakely* on the Sentencing Guidelines, we also concluded that we would be remiss if we did not, *sua sponte*, examine if and how *Blakely* applied to sentences under the Sentencing Guidelines. *See DeGurules v. INS*, 833 F.2d 861, 863 (9th Cir. 1987) ("[A] fundamental principle of our jurisprudence is that a court will apply the law *as it exists when rendering its decision*. . . . [T]his principle applies even when a change to existing law occurs during the pendency of an appeal." (emphasis added)).[3]

[3]Our precedent provides ample support for our authority to consider *sua sponte* a claim that was not initially raised on appeal. We previously have "examine[d] *sua sponte* the application of [a] recent Supreme Court opinion" to a defendant's conviction. *United States v. Garcia*, 77 F.3d 274, 276 (9th Cir. 1996); *see also Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995) (holding that "[w]e will review an issue that has been raised for the first time on appeal under certain narrow circumstances," including "when a change in law raises a new issue while an appeal is pending"); *In re Skywalkers, Inc.*, 49 F.3d 546, 548 n.4 (9th Cir. 1995) (recognizing that a "change in law pending appeal permits entertainment of [an] issue not theretofore raised").

Because Ameline's initial challenges to his sentence assumed a federal sentencing scheme in which the district judge, not the jury, determined the material facts that could increase the severity of punishment using a preponderance of the evidence standard and because *Blakely* undermined the constitutional validity of sentences imposed under this generally mandatory sentencing scheme, we proceeded to address whether *Blakely* applied to the Sentencing Guidelines. Thus, that Ameline did not initially challenge the applicable standard of proof or the judge's factfinding authority at his sentencing hearing did not bar our *sua sponte* consideration of whether *Blakely*'s rules applied to the Sentencing Guidelines. We held, however, that, because Ameline did not interpose his Sixth Amendment objection to his sentence in the district court, we would review for plain error.

[1] Our determination that *Blakely* applied to cases pending on direct appeal was ultimately consistent with the remedial scheme set forth in Justice Breyer's opinion for the Court in *Booker*. *See Booker*, 125 S. Ct. at 769. In *Booker*, the Court held that "we must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review." *Id.* In so holding, the Court recognized that not all cases would warrant a new sentencing hearing because any error might be harmless, or resentencing might not be warranted under a plain error standard of review. *See id.* We again conclude that, although Ameline did not raise a Sixth Amendment challenge to his sentence in the district court or in his initial brief on appeal, we may properly consider his post-*Blakely*/*Booker* Sixth Amendment challenge to his sentence.

B.

[2] In *Booker*, the Court reaffirmed its recent holding in *Blakely* " 'that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by*

the defendant.' " *Id.* at 749 (quoting *Blakely*, 124 S. Ct. at 2537). Emphasizing the mandatory nature of the Sentencing Guidelines, the Court determined that there was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington [sentencing] procedures at issue in [*Blakely*]." *Id.* As the Court explained, "[t]he [Sentencing] Guidelines as written . . . are not advisory; they are mandatory and binding on all judges." *Id.* at 750. Thus, the Court held that the Sixth Amendment as construed by *Apprendi* and *Blakely* applied to the Sentencing Guidelines.

The manner in which the district court arrived at Booker's sentence highlighted the constitutional deficiencies in the Sentencing Guidelines. Booker was convicted of possessing with intent to distribute at least 50 grams of cocaine base (crack), a violation of 21 U.S.C. § 841(a). *Id.* at 745. Although the jury convicted Booker based upon evidence that he had 92.5 grams in his duffel bag, the district judge held a post-trial sentencing hearing and found by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack cocaine and further found that Booker had obstructed justice. On the basis of these additional facts, the Sentencing Guidelines required the district judge to impose a sentence between 360 months and life imprisonment. As a result, Booker received a sentence of 30 years, rather than the sentence of 21 years and 10 months that he would have received based on the facts found by the jury. *Id.* Booker's sentence—360 months—was not authorized by the jury's verdict and was therefore improper under the Sixth Amendment.

[3] Here, Ameline's sentence under the Sentencing Guidelines exceeded "the maximum authorized by the facts established by a plea of guilty or a jury verdict." *Id.* at 756. Ameline admitted to only a detectable amount of methamphetamine.[4] Under 21 U.S.C. § 841(b)(1)(C), Ameline faced a

[4]We previously have held that "even where due process requires that a drug quantity allegation be pleaded in the indictment and proved to a jury

potential sentence of 0 to 20 years. However, the maximum sentence under the Sentencing Guidelines that the district judge could have imposed on the basis of Ameline's admission—without any additional factual findings—would have been sixteen months, given a total base offense level of 12.[5] *See* U.S.S.G. § 2D1.1(c)(14) (base offense level of 12 applies when the offense involved "[l]ess than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual)"). Instead, the district court imposed a sentence of 150 months, based on a base offense level of 34, a two-level upward enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a firearm—based on judicial fact-finding—and a three-point reduction for acceptance of responsibility (for a final offense level of 33). This sentence far exceeded the maximum sentence that the district judge could have imposed under the Guidelines on the basis of facts admitted by Ameline. Thus, as in *Booker*, Ameline's sentence violated his Sixth Amendment rights as construed by *Apprendi* and *Blakely*.

III.

Because Ameline did not object to his sentence on the ground that the Sentencing Guidelines or the procedures used to determine the material sentencing facts were unconstitu-

beyond a reasonable doubt, a defendant can plead guilty to the elements of the offense without admitting the drug quantity allegation." *United States v. Thomas*, 355 F.3d 1191, 1198 (9th Cir. 2004). Here, neither the Superseding Information nor the Indictment charged a specific drug quantity. Nonetheless, at the change of plea hearing the government proffered that Ameline agreed to distribute between one and one and a half kilograms of methamphetamine. Ameline vigorously disputed this characterization and admitted to only a detectable amount of methamphetamine at the plea colloquy. In these circumstances, Ameline's guilty plea did not constitute an admission of the amount proffered by the government.

[5]With one prior conviction in 1997 for "Issuing a Bad Check," Ameline was in criminal history Category I.

tional under *Apprendi*, or on the ground that the material sentencing facts were not alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt, we review for plain error. *See United States v. Cotton*, 535 U.S. 625, 628-29 (2002); *cf. Booker*, 125 S. Ct. at 769.

> [B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. United States, 520 U.S. 461, 466-67 (1997) (citations and quotation marks omitted); *see also United States v. Recio*, 371 F.3d 1093, 1100 (9th Cir. 2004).

A.

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33 (1993). As discussed, Ameline's Sixth Amendment rights as construed in *Blakely* and *Booker* were violated. This constituted error.

B.

[4] In determining whether the error was plain, the Court has explained that it is sufficient that the error is clear under the law as it exists at the time of appeal. *See Johnson*, 520 U.S. at 468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."). It is clear after *Blakely* and *Booker* that, given the mandatory nature of the Guidelines, increasing Ameline's punishment based on facts not admitted by him or determined

by a jury beyond a reasonable doubt was contrary to his Sixth Amendment rights.

C.

[5] For an error to affect "substantial rights," "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. There can be little doubt that the constitutional error in sentencing Ameline affected Ameline's substantial rights. Ameline was deprived of his right to have a jury find beyond a reasonable doubt the quantity of drugs attributable to him. Here, as noted above, and as in *Booker*, the district court's sentence far exceeded the maximum sentence under the Guidelines that was supported by Ameline's admission that his offense involved only a "detectable quantity" of methamphetamine. Without additional factual findings by the court, Ameline faced a maximum sentence of sixteen months. Instead, he received a sentence of 150 months. Under these circumstances, we have no doubt that the constitutional error affected Ameline's substantial rights.

D.

Finally, the error affected the fairness of Ameline's proceedings. In discussing the fairness of the result in *Blakely*, the Court stated:

> Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U.S.C. §§ 841(b)(1)(A), (D), based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled

> by a probation officer who the judge thinks more likely got it right than got it wrong.

Blakely, 124 S. Ct. at 2542.

This is precisely what happened to Ameline. Although Ameline admitted to only a detectable amount of methamphetamine, and vigorously challenged the reliability of the hearsay evidence presented in the PSR to increase his base offense level, the district court, constrained by the Guidelines, imposed a sentence that violated Ameline's Sixth Amendment rights. As the Fourth Circuit recently held, "to leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity or public reputation of judicial proceedings." *United States v. Hughes*, ___ F.3d ___, 2005 WL 147059, at *5 (4th Cir. Jan. 24, 2005) (quotation marks omitted).

[6] Thus, we hold that the district court's imposition of a 150-month sentence under the Sentencing Guidelines in violation of Ameline's Sixth Amendment rights as construed by *Blakely* and *Booker* was plain error. We further hold that remand is necessary because letting Ameline's sentence stand "simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings." *Id.* at *5 n.8. "Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to performing the sentencing function ourselves." *Id.* Accordingly, it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime. This is not such a case. The violation of Ameline's Sixth Amendment rights therefore warrants vacating his sentence and remanding for resentencing.

E.

Upon remand, the district court must resentence Ameline in accordance with the Court's remedial holding in *Booker*. In

the majority remedial opinion by Justice Breyer, the Court considered, "as a matter of severability analysis," whether the Guidelines as a *whole* were no longer applicable "such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute." *Booker*, 125 S. Ct. at 756. The Court, however, ultimately determined that it could address the Sixth Amendment violation by severing 18 U.S.C. § 3553(b)(1), the provision of the Sentencing Reform Act "that makes the Guidelines mandatory," and severing one other provision, 18 U.S.C. § 3742(e), "which depends upon the Guidelines' mandatory nature." *Id.* at 756-57. With these modifications the Court determined that the Sentencing Reform Act "makes the Guidelines effectively advisory," *id.* at 757, but leaves the remainder of the Act intact to "function[ ] independently." *Id.* at 764. Under the Act as modified, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 767.

Thus, under the post-*Booker* discretionary sentencing regime, the advisory guideline range is only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence. For instance, the Sentencing Guidelines' limitations on the factors a court may consider in sentencing—*e.g.*, the impermissible grounds for departure set forth in § 5K2.0(d)—no longer constrain the court's discretion in fashioning a sentence within the statutory range.

Sentencing discretion is not boundless, however; it must be tethered to the congressional goals of sentencing as reflected in the Sentencing Reform Act. *See* 18 U.S.C. § 3553(a). To this end, "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of the Act] set forth in [18 U.S.C. § 3553(a)(2)]." *Id.* Accordingly, in addition to the advisory guideline range, a sentencing court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant"

as well as the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with needed training and medical care. 18 U.S.C. § 3553(a)(1)-(2). In addition, the court must consider the relevant Sentencing Commission policy statements and the need to avoid unwarranted sentencing disparities and to provide restitution to victims. 18 U.S.C. § 3553(a)(5)-(7).

[7] In sum, in exercising discretion, district judges must consider, along with the advisory guideline range, the goals and purposes of sentencing as reflected in § 3553(a) and fashion an appropriate sentence that furthers these objectives. To facilitate meaningful appellate review, the court must also provide a reasoned explanation for its sentencing decision. *See* 18 U.S.C. § 3553(c).

IV.

To provide guidance to the district court upon resentencing, and because the court must determine the advisory guideline sentencing range for Ameline's offense of conviction before imposing a sentence, we address one of Ameline's challenges to his initial sentence that is likely to arise on remand.[6] As noted, Ameline initially challenged his sentence on the ground that the district court incorrectly placed the burden on him of disproving the drug quantity determinations in the PSR. As we explain, the procedure employed by the district court was inconsistent with the basic sentencing procedures that we have held applicable to sentencing determinations under the Sentencing Guidelines and Federal Rule of Criminal Procedure 32. These baseline rules, which ensure fairness and integrity in the sentencing process, remain in force in the post-*Booker* sentencing regime.

[6]Ameline also argued that the district court's drug quantity finding was clearly erroneous because it was based on multiple layers of unreliable hearsay evidence. Because the district court must resentence Ameline consistent with *Booker*, we do not address this issue.

We previously held in *United States v. Howard* that the government "bear[s] the burden of proof for any fact that the sentencing court would find necessary to determine the base offense level." 894 F.2d 1085, 1090 (9th Cir. 1990); *see also United States v. Charlesworth*, 217 F.3d 1155, 1158 (9th Cir. 2000).[7] In so holding, we explained: "Since the government is initially invoking the court's power to incarcerate a person, it should bear the burden of proving the facts necessary to establish the base offense level." *Howard*, 894 F.2d at 1090. We also held that "the government should bear the burden of proof when it seeks to raise the offense level and that the defendant should bear the burden of proof when the defendant seeks to lower the offense level." *Id.* By treating the factual statements in the PSR as presumptively accurate, and placing the burden on Ameline to disprove them, the district court relieved the government of its sentencing burden and required Ameline to establish the factual basis for a lower base offense level than the one recommended in the PSR. This was error.

[8] Although the PSR is essential to the sentencing process, there is nothing sacrosanct about the information contained in the report. Because Ameline raised specific timely objections to the methamphetamine quantity determination in the PSR, it is the government's burden to produce reliable evidence to establish the factual predicate for the court's base offense level determination. It may not simply rely on the factual statements in the PSR.

[7]In *Howard*, we also held that factual disputes under the Sentencing Guidelines should be decided by a preponderance of the evidence. 894 F.2d at 1090. We further have held that, in certain circumstances, the applicable burden of proof at sentencing may be clear and convincing evidence, *see United States v. Johansson*, 249 F.3d 848, 853-54 (9th Cir. 2001), or even reasonable doubt. *See United States v. Thomas*, 355 F.3d 1191, 1202 (9th Cir. 2004). Whether the *Booker* majority remedial opinion affects the standard of proof articulated in these cases is an issue we need not address at this time.

This conclusion follows from the interplay between Federal Rule of Criminal Procedure 32(i)(3)(B) and the rule we adopted in *Howard* that the party seeking to adjust the offense level bears the burden of proof. This conclusion also properly accommodates the due process concern that a defendant be sentenced only on the basis of reliable information. *See United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993); *see also United States v. Navarro*, 979 F.2d 786, 788 (9th Cir. 1992) ("To sentence Navarro on the basis of all the drugs sold, the court had to find that the government had met this burden with regard to each transaction."). When a defendant makes a timely specific objection to the factual accuracy of an assertion in the PSR, Rule 32(i)(3)(B), even after *Booker*, requires the district court to resolve the factual dispute.

Although the district court allowed Ameline to call witnesses to dispute the factual statements in the PSR and made relevant factual findings, by treating the factual statements in the PSR as presumptively accurate, the court erroneously placed the ultimate burden of proof on Ameline. Under the district court's procedure, Ameline was required to prove a negative and to bear the risk of his failure of proof. Although the final Sentencing Guidelines range is nonbinding under *Booker*, there are serious sentencing ramifications to the district court's factual findings. The district court's drug quantity determination will directly affect the base offense level, the starting point for determining the applicable guideline range for an offense under 21 U.S.C. § 841(a)(1). *See* U.S.S.G. § 2D1.1(c).

In light of the fact that Ameline presented numerous witnesses who disputed the PSR's base offense level of 32, all of whom raised serious questions regarding the total quantity of drugs attributable to Ameline, the district court must resolve any material factual dispute consistent with the basic procedures outlined above before it exercises its sentencing discretion and imposes a sentence in conformity with *Booker*.

V.

In conclusion, we hold that Ameline's sentence imposed under the mandatory Sentencing Guidelines violated his Sixth Amendment rights as construed by *Blakely* and *Booker* and this violation constituted plain error. Accordingly, we remand for resentencing in light of *Booker* and consistent with the views expressed in this opinion.

VACATED and **REMANDED**.

No petition for rehearing will be entertained and the mandate shall issue forthwith.

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 10 2005

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALFRED ARNOLD AMELINE, Defendant - Appellant.	No. 02-30326 D.C. No. CR-02-00011-SEH District of Montana, Great Falls ORDER

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

The opinion filed on February 9, 2005 is amended by deleting the last sentence on page 23. The mandate issued on February 9, 2005 is recalled. The parties shall file any petition for rehearing and/or rehearing en banc no later than February 18, 2005. In the event that such a petition is filed, a response shall be filed within seven days thereafter. *See* Fed. R. App. P. 40(a)(1), 35(c).